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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re)	No. 01-30923 DM
)	
PACIFIC GAS & ELECTRIC)	Chapter 11
COMPANY,)	
)	
Debtor.)	Date: June 18, 2001
)	Time: 1:30 p.m.
)	Ctrm: Hon. Dennis Montali
)	235 Pine Street
)	San Francisco, California
)	22nd Floor

**SUPPLEMENTAL OBJECTION OF THE UNITED STATES TRUSTEE TO
APPLICATION OF OFFICIAL COMMITTEE OF UNSECURED CREDITORS
FOR AN ORDER EMPLOYING PRICEWATERHOUSECOOPERS LLP**

TO THE HONORABLE DENNIS MONTALI, UNITED STATES BANKRUPTCY JUDGE:

On May 22, 2001, the United States Trustee filed an objection to the proposed employment of PricewaterhouseCoopers LLP ("PWC") by the Official Committee of Unsecured Creditors ("Creditors Committee"). The United States Trustee hereby submits this supplemental objection. PWC continues to represent debtor's parent ("PG&E

1 Corp.”), and PWC continues to represent the Official Participants’ Committee in California
2 Power Exchange (“Cal PX”), another bankruptcy case where the interests of PWC’s client
3 conflicts with those of this estate. The so-called ethical wall described in the Creditors’
4 Committee’s revised application and declaration will not fix the conflict.^{1/} .

5 **Representation of Debtor and its Parent Makes PWC Ineligible**

6 The Creditors’ Committee has requested retention of PWC as accountants and
7 financial advisors under 11 U.S.C. §§1103(b) and 328. Professionals employed under 11
8 U.S.C. §1103(b) must be disinterested, may not “represent any other entity having an
9 adverse interest in connection with the case,” must have no conflict of interest, and owe
10 fiduciary obligations of undivided loyalty to the Creditors’ Committee. 11 U.S.C.
11 §§1103(b), 328(c) and 101(14) and (31).

12
13 As set forth in the Second Supplemental Declaration at 5, “PWC provided
14 restructuring and energy consulting services to the Bank Group of PG&E Corporation
15 from January 2001 to the date of refinancing by the Parent and to Pacific Gas & Electric
16 Company from January 2001 to the date of filing by the Debtor.” The restructuring and
17 refinancing is a veritable iceberg of issues underlying the administration of this case. The
18 investigation and any resolution of issues may have a direct bearing on the eventual
19 disposition of the case and resulting payment to creditors. The Creditors’ Committee is
20 the entity most likely to bring and direct the investigation. On April 3, 2001, the Public
21 Utilities Commission of the State of California entered an order instituting an investigation
22

23
24 ^{1/}Applicant has forwarded to the United States Trustee a draft Second Supplemental
25 Declaration of Thomas E. Lumsden in Support of “Revised Application of Official
Committee of Unsecured Creditors, etc.” (“Second Supplemental Declaration”).
Presumably the draft Second Supplemental Declaration is now final in substantially the
same form and has been filed.

1 of certain transactions between and pertaining to PG&E Corp. and the debtor including
2 PG&E's Corp.'s loan restructuring. PWC, the proposed professional requested to be
3 retained to perform accounting and financial advisory services with respect to these
4 investigations, is the very entity which provided the services to be investigated. The
5 retention request puts PWC in an impossible situation. PWC will owe conflicting duties to
6 the Creditors' Committee on the one side and debtor and its parent on the other.
7 Moreover, if retained, PWC may be in the unenviable and untenable position of
8 investigating for one client the work it has performed for another. PWC's fiduciary duty of
9 undivided loyalty to the Creditors' Committee fails. PWC itself may be the subject of its
10 own investigation. This failure of disinterest interferes with PWC's duty of undivided
11 loyalty, confidentiality and obligation of vigorous representation.
12

13 PWC represented and continues to represent debtor's parent, PG&E Corp., and
14 debtor on several other matters, including consulting services, internal audit services,
15 environmental litigation, and pre-filing tax work. PWC's decision to continue working for
16 debtor and its parent establishes the significance and importance to PWC of the
17 continued employment and involvement in debtor's business affairs. Interestingly, the
18 Second Supplemental Declaration at 3-4 indicates an anticipated contractual fee dispute
19 with respect to the tax work, expected to involve less than a million dollars. In addition to
20 desiring future employment engagements with debtor and its parent, PWC may be
21 involved in litigation with respect to fees from previous work. PWC characterizes the fee
22 dispute of \$1 million as not material. The implication is the anticipated future work
23 represents many millions of dollars. PWC acknowledges its own interests with respect at
24 least to the possible fee dispute. In addition, the existence of continuing relationships
25

1 with clients as important as debtor and PG&E Corp. may well influence decisions of
2 PWC. Lack of disinterest makes PWC ineligible for employment.

3 **Representation of the Participants Committee Makes PWC Ineligible**

4 As set forth in the Second Supplemental Declaration at 4, PWC served “as
5 financial advisor to the Official Participants Committee in the Cal PX Bankruptcy. . . .”
6 PG&E was one of the largest sellers of power through the Cal PX and was also one of
7 the largest purchasers of power through Cal PX. The Official Participants Committee. . .
8 will be seeking recovery of their claims from assets that were held by the Cal PX and
9 from the net buyers, presumably PG&E.” (Also, the Second Supplemental Declaration at
10 5 indicates Coopers & Lybrand, now merged into PWC, and Mr. Lumsden were involved
11 in the start-up and initial operation of the California ISO and Cal PX.) Consequently,
12 PWC represents an entity which may have a direct conflict in this case. The Second
13 Supplemental Declaration suggests a commonality of interest. However, as the
14 representative of the Participants Committee, PWC may have access to or obtained
15 confidential information in that case which would make assisting the Creditors Committee
16 in objecting to pricing by producers in this case difficult or impracticable. If retained,
17 PWC may owe conflicting duties to the Participants Committee and the producers serving
18 on or represented by that committee on the one hand, and the Creditors’ Committee in
19 this case on the other. The representation of the Participants Committee may constrain
20 the vigor of the proposed representation of the Creditors’ Committee.
21

22 **Ethical Walls Do Not Correct PWC’s Ineligibility**

23 PWC has significant and ongoing connections and relationships with debtor,
24 PG&E Corp., the Participants Committee, and a variety of creditors and interested
25 parties. The revised application provides for the imposition of a so-called ethical wall with

1 respect to the partners and staff of PWC serving the Creditors' Committee. The revised
2 application sets forth ethical walls at 2:21 with respect to matters where debtor or its
3 parent or affiliates are adversaries or interested parties, litigation consulting services on
4 behalf of purchasers of power, retention as financial advisor for the creditors committee
5 for the California Power Exchange, consulting services for Assembly Speaker Hertzberg,
6 valuation and restructuring analysis for bondholders of a wind power Qualifying Facility,
7 and numerous debtors and creditors, at 3:14-28 and 4:1-3 with respect to certain distinct
8 projects, and at 4:19-21 with respect to partners and managers holding stock in debtor's
9 parent. The Second Supplemental Declaration starting at 6 discusses the so-called
10 ethical wall.

11
12 The existence of an ethical wall fails to correct or address the problem. An ethical
13 wall is "not an acceptable means of conflict avoidance where the same professional
14 organization actively represents two adverse interests." *Matter of Trust America Service*
15 *Corp.*, 175, B.R. 413, 421 (Bankr. M.D. Fla. 1994.) (Ethical wall was ineffective to
16 address conflict of interest compelling denial of fees.) *See also Matter of Davenport*
17 *Communications Ltd. Part.*, 109 B.R. 362 (Bankr. S.D. Iowa 1990). (Prior representation
18 of related partnerships makes proposed professional ineligible.) If retained, PWC will
19 owe conflicting duties of confidentiality, undivided loyalty, and vigorous representation to
20 clients whose respective interests may be adverse to each other. Loyalty connotes the
21 full expertise and energy of the professional be devoted to the client's interests.
22 Confidentiality ensures a client is free to divulge any and all information to assist the
23 professional in the representation. *See, e.g., In re Vanderbilt Associates, Ltd.*, 1112 B.R.
24 347, 351-352 (Bankr.D.Utah 1999).
25

1 Regardless of whether specific individuals and offices can be segregated in fact
2 from others and their communication limited, policy decisions are made and implemented
3 at levels that transcend the metaphorical wall. Pressure from debtor, its parent or the
4 Participants Committee could be brought on PWC, for example, to obtain compliance
5 from particular members of the firm in furtherance of their interests. Whether certain
6 employees are in fact sharing information with other specified employees does not
7 prevent the existence of the pressure on members of the firm. Ethical walls do not
8 prevent pressures of this sort. The pressure is inherent in an ongoing representation of a
9 client's interest. Those making policy decisions are at levels beyond the extent and
10 influence of the so-called wall. PWC's continued representation of debtor and its parent
11 is significant and meaningful and could influence future advice and decisions. PWC's
12 representation of debtor and its parent especially with respect to the pre-petition
13 restructuring and refinance coupled with its desire and intention to continue the
14 representation could affect advice and decisions in representing the Creditors'
15 Committee. In an investigation brought on behalf of the Creditors' Committee, PWC
16 would be responsible for reviewing its own work.

18 A professional in a bankruptcy case should not be put in the position of having to
19 divide its loyalties. No professional may be appointed in a bankruptcy estate unless his or
20 her loyalty and fiduciary duties are undivided. Prohibiting communication, as claimed in
21 an ethical wall situation, does not make the conflicting duties undivided. When different
22 arms of the same professional represent parties whose interests may be adverse, the
23 professional is still in an untenable position, owing divided loyalties to adverse parties.
24 Representing more than one party presents an inherent conflict of interest because both
25 clients may rely upon the professional's advice and the clients' respective interests may

1 be adverse to each other. This is not to suggest any improper behavior or intent on the
2 part of any individuals. This is to suggest a proposed professional in a bankruptcy case
3 should not be put in a position where such influences and issues may arise.

4 PWC's representation of parties adverse to the Creditors' Committee is pervasive.
5 The creation of an ethical wall is irrelevant to the problem. A disinterested and conflict-
6 free professional should be retained instead. Professionals in a bankruptcy case must be
7 disinterested and conflict-free. The use of ethical walls reduces the rule to a nullity.

8 WHEREFORE, the United States Trustee respectfully requests that the Official
9 Committee of Unsecured Creditor's Application for an Order Employing
10 PricewaterhouseCoopers LLP ("PWC") be denied.

11 Dated: July 12, 2001

12 Respectfully submitted,

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16 Patricia A. Cutler
17 Assistant U.S. Trustee
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